IN THE

Supreme Court of the United States

No. 78-83

TIMKEN COMPANY, *Petitioner*

v.

THE ENVIRONMENTAL PROTECTION AGENCY, and DOUGLAS COSTLE, Administrator of the ENVIRONMENTAL PROTECTION AGENCY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY MEMORANDUM FOR THE PETITIONER

ERWIN N. GRISWOLD
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

ROBERT M. RYBOLT
800 Cleve-Tusc. Building
Canton, Ohio 44702

Counsel for the Petitioner

Of Counsel:

THOMAS F. CULLEN, JR.
JONES, DAY, REAVIS & POGUE
1100 Connecticut Avenue, N.W.
Washington, D. C. 20036

JEFFREY P. WHITE
DAY, KETTERER, RALEY, WRIGHT & RYBOLT
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The government's Brief in Opposition evades the crucial elements of the petitioner's argument.

First, the government does not dispute the fact that RAM is a very different model than any used in the past, though the implications of the differences are ignored.

Second, full notice and comment procedures were held on the plan proposed on November 10, 1975 (40 Fed. Reg. 82410), but the government does not argue that this plan and RAM are even similar.

Third, the government makes no defense of the rationality of the RAM model and no attempt to explain the anomalies it creates.

In sum, the government's position is that because other models have been upheld by courts in the past, and because a notice and comment procedure was undertaken with regard to the EPA's previous, totally different, plan, the RAM model and the procedure used to produce it are unexceptionable. The issues which make this case an appropriate one for review are glossed over, rather than dealt with.

I.

The EPA's Use of the RAM Model Presents Important New Issues For Administrative Decisionmaking and the Use of Computer Models.

The RAM model is different from previous EPA models, and the EPA has used it differently. See Petition for Certiorari on behalf of the Timken Company (Timken Pet.) at pp.7, 25-27. The government does not deny this; instead, it attempts to portray the differences as merely differences in degree of sophistication. Brief in Opp. at pp. 3, 7. But no previous case concerning computer modelling involved an emission control plan which relied on computer prediction of the emission problem to the exclusion of information gathered from monitors on the spot; no previous model used information on specific facilities to derive specific emission limitations for those facilities; and no previous model was adopted with such inadequate testing and examination. See Timkin Pet. at p. 7. The RAM model itself is the administrative rule; the operation of the model on specific facilities is application of the rule; and there is no check or safeguard on the operation of this closed mathematical construct, which acts, in effect, as both legislator and adjudicator. See Timken Pet. at pp. 20-21.

These issues are not presented where, as in the cases cited by the government,* a simple "rollback" model is used to generate proportional emission limitations on the basis of monitored air quality. The issue in those cases, where much simpler but admittedly imperfect models were upheld, was the rationality of some governmental response in the face of an established problem. For the predictive RAM model, the issue is different because (1) the model is being used in a more ambitious way, and (2) there is less procedural and substantive assurance of rationality in the circumstances of this case. The EPA must be required to make ". . . a showing of the reliability of the methodology of prediction. . ." *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 642 (D.C. Cir. 1973).

II.

Notice and Comment on the Plan Previously Proposed By the EPA is Not Notice and Comment on RAM.

The government recites the number of comments and the number of support documents submitted concerning

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* *Texas* v. *Environmental Protection Agency*, 499 F.2d 289, 297-301 (5th Cir. 1974), *certiorari denied*, 427 U.S. 905 (1976); *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646, 662-663 (1st Cir. 1976); *Kennecott Copper Corp.* v. *Train*, 526 F.2d 1149, 1152, n. 16 (9th Cir. 1975), *certiorari denied*, 425 U.S. 935 (1976).

But see Sierra Club v. *Environmental Protection Agency*, 540 F.2d 1114, 1136 (D.C. Cir. 1976), *remanded on other grounds, sub. nom. Montana Power Corp.* v. *EPA*, 434 U. S. 809 (1977), (Brief in Opp. at p. 7), in which the court of appeals upheld the use of predictive modelling techniques to establish relative emission standards for various sources. The EPA conceded that the prediction was unrelated to acutal air quality but argued successfully that any consistent method was acceptable for the limited purpose of calculating the relative contribution to pollution of various sources. Under these circumstances, the court noted there was in the record "no basis on which to question EPA's judgment" and agreed that "lack of precision alone" was not a substantial objection. Basically, the model was used in the same way as rollback models was used in the other cases cited.

the previous plan, which the EPA proposed on November 10, 1975 (40 Fed. Reg. 52410); but the government does not argue that the two plans are basically the same, or even similar. See Timken Pet. at 11-15. The government evades, rather than disputes, the critical differences between the plan proposed in 1975, and the one at issue here.

The government's basic position on this point seems to be that notice and comment procedures are notice and comment procedures no matter what the subject is. This stance resembles strongly the position discussed above, that computer models are computer models, despite differences in content and use.

The record is perfectly clear that the RAM model emerged in this proceeding as a total surprise. (Timken Pet. at pp. 13-14, fn. 12). Indeed, in August of 1976, sixteen days before the regulation emerged and eight months after publication of the initial proposal, RAM's authors were still talking to EPA about "further testing and debugging." See Timken Pet. at pp. 7-8 n. 5. Comments submitted on the November 1975 proposal can hardly conform to the government's characterization as a "thorough scientific dialogue" on RAM. (Brief in Opp. at p. 7).

The government notes that in one respect the RAM model was a response to general industry criticism that the previous proposal was crude and general. (Brief in Opp. at p. 7). It is unclear why this previous complaint should estop the petitioners from opportunity to comment on the spurious sophistication of the RAM model. See Timken Pet. at 11-15.

The government cites no authority on this issue and fails to deal with basic administrative law doctrine: meaningful opportunity for comment must be based on fair and timely apprisal of agency proposals, *United States* v. *Florida East Coast Rwy. Co.*, 410 U.S. 224, 243 (1973); and subsequent changes in an agency proposal can make a prior comment period worthless. *Maryland* v. *EPA*, 530 F.2d 215, 222 (4th Cir. 1975) *vacated on other grounds*, 431 U.S. 99 (1977) (*per curiam*); *Rodway* v. *Department of Agriculture*, 514 U.S. 809 (D.C. Cir. 1975); *Wagner Electric Corp.* v. *Volpe*, 466 F.2d 1013 (3rd Cir. 1972); *see also Mision Industrial, Inc.* v. *EPA*, 547 F.2d 123, 126 n.2 (1st Cir. 1976) (*dictum*).

Finally, the reopening of the record for comment on the RAM model—upon which the government relies so heavily—was simply no reopening at all. Although, as the government states, Timken and other petitioners submitted technical analyses and data, EPA declared itself deaf to virtually all of the material. The EPA interpreted the remand to require it to entertain only comments relating to its own clerical and computational errors in handling its raw data; this position was communicated directly and forcefully to all the petitioners below. See Timken Pet. at 8, n. 6. Despite the government's contentions, "Timken and other polluters"—did not have anything resembling "full opportunity to challenge the use of the model" (Brief in Opp. at p. 8); and the government never faces the implications of the precedent requiring "full oportunity." *See, e.g., Mobil Oil Corp.* v. *Federal Power Commission*, 488 F.2d 1238, 1258 (D.C. Cir. 1973).

III.

The RAM Model Has Not Been Supported On Its Merits.

The "searching inquiry" required by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971) is not provided merely because the Court of Appeals discussed RAM "at length." Brief in Opp. at p. 9. Nor do the

petitioners argue that the issue is whether RAM is "perfect" or not. The difference between the government and the petitioner on this point is that the government merely accepts and repeats the conclusory statements of the court of appeals, as the court of appeals merely repeated the conclusions of the EPA, while Timken has looked critically at the analysis and the evidence.

There are numerous examples in the Timken petition of glaring problems with the RAM model which the court of appeals dealt with unsatisfactorily if at all, and which the government simply does not face:

1. The EPA's reliance on computer prediction to the exclusion of monitor data (Timken Pet. at p. 25);

2. The demonstrated tendency of RAM to overpredict pollution concentration (Timken Pet. at pp. 14-15, n. 13-14, 24-25);

3. The cumulative "worst-case" assumptions used by the EPA in RAM. (Timken Pet. at p. 26);

4. The imposition of stringent and costly controls in certain areas where there has never been a measured violation of national ambient air quality standards. (Timken Pet. at p. 27).

Perfection is not the issue, but rationality and safeguards most certainly are. The RAM model was substantively, as well as procedurally, taken on faith. In operation of the model, RAM dispenses with monitor data; in promulgation of the model, the EPA dispensed with the participation of those affected. The petitioner asks this Court to make it clear that administrative decision-making by computer must be disciplined by adequate real data, and by appropriate participation by interested parties.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
1100 Connecticut Avenue, N.W.
Washington, D. C. 20036

ROBERT M. RYBOLT
800 Cleve-Tusc. Building
Canton, Ohio 44702

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September , 1978